

FILED

DISTRICT COURT OF GUAM

MAR 16 2006 9P

**MARY L.M. MORAN
CLERK OF COURT**

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

JULIE BABAUTA SANTOS, *et al.*,

Plaintiffs,

vs.

FELIX A. CAMACHO, *et al.*,

Defendants.

Civil Case No. 04-00006
(Consolidated with Civil
Case Nos. 04-00038 and
04-00049)¹

**ORDER RE: MOTION
FOR RECONSIDERATION OF
ORDER DISQUALIFYING
ELECTED ATTORNEY GENERAL**

This matter comes before the court on the Attorney General's Motion for Reconsideration of Order Disqualifying Elected Attorney General. Pursuant to Local Civil Rule 7.1(e)(3), this matter is appropriate for decision without the need for oral argument.² After reviewing the submissions, as well as relevant caselaw and authority, the court hereby denies the motion.

BACKGROUND

Currently there are three class actions pending concerning Guam's Earned Income Tax Credit ("EIC"). The above-captioned case is the first of the three. It was filed on February 12,

¹All parties in the consolidated cases are to hereafter file their documents under the caption of *Santos v. Camacho*, Civil Case No. 04-00006.

²Local Civ.R. 7.1(e)(3) states "[i]n cases where the parties have requested oral argument, such oral argument may be taken off calendar by Order of the Court, in the discretion of the Court, and a decision rendered on the basis of the written materials on file."

1 2004. On August 9, 2004, Ms. Charmaine R. Torres filed a second putative EIC class action,
2 *Torres v. Government of Guam, et. al.*, Guam Dist. Ct. Civil Case No. CV04-00038. The third
3 class action, *Simpao v. Government of Guam*, Guam Dist. Ct. Civil Case No. CV04-00049 was
4 filed in December 2004.

5 On February 16, 2005, the Governor of Guam moved to disqualify the Attorney General
6 from further representation of the Government of Guam in the *Santos* matter. On September
7 19, 2005, the magistrate judge denied the Governor's Motion to Disqualify the Attorney
8 General from this action. The Governor then filed objections to the magistrate judge's order
9 which this court sustained in its March 10, 2006 Order. The court now considers the Attorney
10 General's motion to reconsider the most recent order.

DISCUSSION

Pursuant to Local Civil Rule 7.1(i), a party may seek the reconsideration for only three reasons:

14 (1) a material difference in fact or law from that presented to the Court before
15 such decision that in the exercise of reasonable diligence could not have been
16 known to the party moving for reconsideration at the time of such decision, or,
17 (2) the emergence of new material facts or a change of law occurring after the
18 time of such decision, or,
19 (3) a manifest showing of a failure to consider material facts presented to the
20 Court before such decision.

19 | Local Civ. R. 7.1(i).

20 The Attorney General's motion does not state or otherwise suggest a basis for
21 reconsideration under Local Rule 7.1. The Attorney General has failed to demonstrate a
22 material difference in fact or law, the emergence of new facts or a change in law, or to make a
23 manifest showing that the court failed to consider material facts. The Attorney General's
24 motion for reconsideration is denied.

25 In the alternative, the Attorney General moves the court for interlocutory appeal for the
26 following question:

27 *Whether the Attorney General of Guam may be disqualified from representing
the Government of Guam (People of Guam) in tax litigation cases when his*

1 opinions varies from that of the Governor of Guam.³

2 Motion to Certify Question for Interlocutory Appeal, p. 2.⁴

3 Interlocutory appeal by permission is governed by 28 U.S.C. § 1292(b), which provides
4 as follows:

5 When a district judge, in making in a civil action an order not otherwise
6 appealable under this section, shall be of the opinion that such order involves a
7 controlling question of law as to which there is substantial ground for difference
8 of opinion and that an immediate appeal from the order may materially advance
9 the ultimate termination of the litigation, he shall so state in writing in such
10 order. The Court of Appeals which would have jurisdiction of an appeal of such
action may thereupon, in its discretion, permit an appeal to be taken from such
order, if application is made to it within ten days after the entry of the order:
Provided, however, That application for an appeal hereunder shall not stay
proceedings in the district court unless the district judge or the Court of Appeals
or a judge thereof shall so order.

11 The certification for an order for interlocutory appeal is proper provided: (1) it "involves
12 a controlling question of law; (2) there is substantial grounds for difference of opinion; and (3)
13 an immediate appeal may materially advance the ultimate termination of the litigation." *In re*
14 *Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir.1982) (Section 1292 is to be used
15 only in exceptional situations in which allowing an interlocutory appeal would avoid protracted
16 and expensive litigation").

17 The court finds that the Attorney General's proposed appeal meets the requirements of
18 §1292(b). The question of who is in charge of the litigation is a controlling question of law
19 which clearly has bearing on the outcome of these matters. Over the past two years this issue
20 has been gaining steam. The parties and the court have expended considerable time and
21 resources grappling with this issue as the docket in the three cases reflects. It would be
22 imprudent for the court to further expend resources until the issue of who controls the litigation

24 ³The court does not necessarily agree with the framing of the question by the Attorney General
25 and views the following issues as more appropriate for appeal: 1) whether the Governor should control
the course of litigation for the Government of Guam when it involves tax matters; and 2) is the
26 Attorney General's disqualification necessary when he takes an adverse position to former clients in the
same case.

27 ⁴The ruling set forth herein disposes of the Motion to Certify Question for Interlocutory Appeal
28 and the court will not rule on the motion in a separately filed order.

1 is finally resolved. For example, it would be a waste of resources to proceed with a complex
2 fairness evaluation of a settlement agreement, if it is later determined that the Governor was
3 actually lacking the settlement authority to enter into it.

4 It is not enough for a party to show that it disagrees with a court ruling to demonstrate
5 “a substantial ground for difference of opinion” on a question for § 1292(b) certification. *See,*
6 *e.g., First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996) (“Mere
7 disagreement, even if vehement, with a court’s ruling on a motion to dismiss does not establish
8 a ‘substantial ground for difference of opinion’ sufficient to satisfy the statutory requirements
9 for an interlocutory appeal”). However, a district court must analyze the strength of the
10 arguments in opposition to the challenged ruling in determining whether a substantial ground
11 for difference of opinion truly exists. *Ryan, Beck & Co., LLC*, 275 F. Supp. 2d, 393, 398.
12 Indeed, an issue can be a controlling question of law for which there is a substantial ground for
13 difference of opinion when it is “difficult and of first impression.” *Klinghoffer v. S.N.C. Achille
14 Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d
15 21, 25 (2nd Cir 1990).

16 The Guam Organic Act gives the Governor primacy as to tax matters and enforcement
17 powers over the Guam Territorial income tax. In contrast, the Attorney General is the “Chief
18 Legal Officer,” constitutionally empowered to *represent* the Government of Guam. “The
19 Organic Act serves the function of a constitution for Guam.” *Hauser v. Department of Law*, 97
20 F.3d 1152, 1156 (9th Cir. 1996).⁵ Both the Governor and the Attorney General claim the
21 Organic Act provides each with the ultimate power over tax litigation matters.

22 This court determined that the Governor has authority over the enforcement of tax
23 matters, and thus, may dictate the course of litigation in this matter. However, the court
24 recognizes that this issue is one of first impression on Guam and there is considerable room for
25 reasonable jurists to disagree.

26
27 ⁵ The “Guam Organic Act Amendments of 1998”, H.R. 2370, 105th Cong. (1998), created the
28 position of the Attorney General of Guam.

1 Lastly, the court finds that an immediate appeal of this issue will materially advance the
2 ultimate termination of the litigation. Two settlement agreements have been drafted, one that
3 the Attorney General agrees with, and a second one that the Governor of Guam proposes. The
4 ultimate termination of the litigation by trial or settlement is only possible with all the right
5 parties present. The Ninth Circuit's ruling in the pending motion will assist in this process.

CONCLUSION

7 For the foregoing reasons, the court **DENIES** the Attorney General's Motion for
8 Reconsideration. However, the court finds the Attorney General has satisfied the requirements
9 for certification of an interlocutory appeal. Accordingly, the court **GRANTS** the Attorney
10 General's Motion to Certify Question for Interlocutory Appeal and certifies the issue of the Attorney
11 General of Guam's disqualification in this case to the Ninth Circuit of Appeals. Meanwhile,
12 this court will consider any motions filed by counsel for appointment as lead counsel. Any such
13 motion should be filed by April 7, 2006. Oppositions or responses should be filed by
14 April 21, 2006, and replies should be filed by April 28, 2006. Thereafter, the court will decide
15 the issue on the pleadings or set the matter for a hearing should one be deemed necessary. All
16 other matters are hereby stayed pending the interlocutory appeal.

17 SO ORDERED this 16th day of March, 2006.

JAMES L. ROBART* for
RICARDO S. MARTINEZ**
United States District Judge

¹The Honorable James L. Robart, United States District Judge for the Western District of Washington, by designation.

²⁷ **The Honorable Ricardo S. Martinez, United States District Judge for the Western District of
28 Washington, by designation.